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No. 86-635

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM HOGUE ..... *Petitioner*

vs.

BILL CLINTON, GOVERNOR OF THE STATE OF ARKANSAS; KENNETH WHITLOCK; BARRETT TONE; GAIL HUECKER; RAY SCOTT AND CURTIS IVERY, IN THEIR CAPACITY AS EMPLOYEES OF THE DEPARTMENT OF HUMAN SERVICES OF THE STATE OF ARKANSAS ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION

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QUESTION PRESENTED

WHETHER A COURT OF APPEALS' REVERSAL OF THE DISTRICT COURT WAS BASED ON A QUESTION OF LAW OR OF FACT; IF BASED ON FACT, WERE THE MANDATES OF FEDERAL RULE OF CIVIL PROCEDURE 52(a) AND *ANDERSON V. CITY OF BESSEMER, NORTH CAROLINA*, 470 U.S. ____ 105 S.Ct. 1504, 84 L. Ed. 2d 518 (1985) IGNORED.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINION BELOW iv

JURISDICTIONAL GROUNDS iv

STATUTORY PROVISION INVOLVED iv

STATEMENT OF THE CASE 1

REASON(S) FOR DENYING THE WRIT 4

CONCLUSION 7

TABLE OF AUTHORITIES

CASES — Page

Anderson v. *City of Bessemer, North Carolina*, 470 U.S. ___, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) 4

Bishop v. *Wood*, 326 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976) 4, 6

Board of Regents of State Colleges v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) 6

Cato v. *Collins*, 539 F.2d 656, 660-661 (8th Cir. 1976) 5

Goodisman v. *Lytle*, 724 F.2d 818, 820 (9th Cir. 1984) 5

Griffin v. *Erickson*, 277 Ark. 433, 642 S.W.2d 308 (1982) 4, 6

Patton et al v. *Ragland* and *Charles* v. *Gordon et al*, 282 Ark. 231, 668 S.W.2d 3 (1984) 3

Perry v. *Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) 6

Zeigler v. *Jackson*, 716 F.2d 847, 849 (11th Cir. 1983) 5

STATUTES

28 U.S.C. §1254(3) iv

42 U.S.C. §1983 3

Fed. R. Civ. P. 52(a) 4

Acts of Arkansas, Act 693 of 1981 5

OPINION BELOW

The Opinion of the United States District Court for the Western District of Arkansas, reported at 605 F.Supp. 1288 (1985), the opinion of the United States Court of Appeals for the Eighth Circuit (unreported to date), and the dissenting opinion of Chief Judge Lay (unreported to date) are reprinted as Appendices A, B and C, respectively to the Petition for Writ of Certiorari beginning at page 12.

JURISDICTION

The petitioner relies upon 28 U.S.C. §1254(3) as the basis of this Court's jurisdiciton.

STATUTORY PROVISIONS INVOLVED

The petition has adequately set forth the statutory provisions involved.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

Petitioner was employed by an agency of the State of Arkansas known as the State Department of Human Services, Division of Social Services, from September 1, 1962 until his termination on October 10, 1980. Petitioner was director of the Scott County Office of Social Services located in Waldron, Arkansas.

During the summer of 1980, before the Democratic Primary had been held, then State Senator Gene Rainwater received from Bud Rice, a State Representative from the Waldron area, a letter he had received from two individuals who were residents of Waldron. The letter alleged impro-

prieties in relation to petitioner's administration of Social Services programs.

W. A. Tudor, at that time the Director of Investigations-Medicaid Fraud for the Division of Social Services received the letter and began an investigation of the allegations. On August 11, 1980, Tudor submitted a report to Barrett Toan, Commissioner of the Division of Social Services, setting forth allegations of wrongdoing. These allegations are set out in the District Court's Opinion at App. #1 in App. "A" of Petitioner's Motion.

Subsequent to the aforementioned report, Commissioner Toan directed Tudor and his investigators to interview employees and former employees in order to identify as many suspect cases as possible. After these interviews were completed Tudor submitted a report dated August 25, 1980 to Commissioner Toan. The second report contained 19 allegations of wrongdoing, which are set forth at App. #2 at App. "A" of Petitioner's Motion. After reviewing the reports, Commissioner Toan made the decision to terminate plaintiff. On September 2, 1980, Toan wrote petitioner advising him that he was being terminated as of September 2, 1980, and cited reasons why.

On September 11, 1980, Toan informed petitioner that a grievance proceure existed at the Department of Human Services. Petitioner appealed to Gail Huecker, Director of Department of Human Services, on September 16, 1980 and requested a review of the termination. Petitioner was reinstated with back pay and placed on administrative leave on September 29, 1980 by Gail Huecker. Ms. Huecker allowed Commissioner Toan seven (7) days to make a final determination as to whether future actions would be taken against petitioner.

A hearing was held in the Office of Commissioner Toan on October 2, 1980. The purpose of the hearing was to discuss

the allegations against Hogue. On October 11, 1980, Toan wrote petitioner advising that he was being terminated from his employment effective October 10, 1980. Petitioner appealed to Gail Huecker a second time on October 13, 1980, and another hearing was held on October 29, 1980, in the offices of Ray Robinson, Deputy Director of Human Services.

By letter dated November 3, 1980, petitioner was advised that his termination would be upheld. The letter advised petitioner that if he did not agree with the decision that he could appeal to the Arkansas Merit Council under their rules and regulations. While the Merit Council appeal was pending, the State enabling statute creating the Council was declared by a State Court to be an unconstitutional delegation of Legislative authority. That decision was affirmed by the Arkansas Supreme Court in the consolidated cases of *Patton, et al.* v. *Ragland* and *Charles* v. *Gordon, et al.*, 282 Ark. 231, 668 S.W.2d 3 (1984).

By letter dated August 12, 1983, petitioner was advised by Curtis L. Ivery, who had succeeded Barrett Toan as Commissioner of Social Services, that in effect, his termination would not be reviewed and that the Division would not "take any further action regarding your termination." The letter advised petitioner that he had exhausted his internal appeal and if he desired to pursue the matter he might initiate civil litigation.

The petitioner filed suit under 42 U.S.C. §1983 alleging that he had been deprived of both liberty and property without due process of law. The case was tried to the Court on January 14 and 15, 1985. The District Court held that petitioner had a property interest in continued employment by applicable personnel rules and regulations. The Eighth Circuit Court of Appeals reversed the District Court by finding that "under Arkansas law, because he was not employed for a definite term, Hogue was an employee at will, subject to dismissal at any time without cause." The Court of Appeals' Opinion is found at Appendix "B" of Petitioner's Motion.

REASONS FOR DENYING THE WRIT

It is noted in Rule 17 of the Rules of the Supreme Court that review on a Writ of Certiorari is not a matter of right, but of judicial discretion and will be granted only when there are special and important reasons therefor. The rule states that the Court's discretion may be exercised when a federal court of appeals has rendered a decision in conflict with applicable decisions of this Court. Also, this Court's discretion may be exercised when a federal court of appeals has decided a federal question in a way in conflict with a state court of last resort.

Petitioner has cited Fed. R. Civ. P. 52(a), and *Anderson* v. *City of Bessemer, North Carolina*, 470 U.S. ___ , 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) in support of his argument that the Eighth Circuit has substituted its judgment for that of the district court without finding that the district court's decision was clearly erroneous. Such reliance on *Anderson* and Rule 52(a) is misplaced. Whether petitioner had an expectation of continued employment by virtue of respondents' policies and procedures on employee grievances is a question of law not of fact.

To assert a property interest sufficient to trigger the application of procedural due process guarantees, reference must be made to state law. *Bishop* v. *Wood*, 326 U.S. 341, 344, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). Under Arkansas law, an employee is generally terminable at will in absence of an employment contract for a fixed term. *Griffin* v. *Erickson*, 277 Ark. 433, 642 S.W.2d 308 (1982).

The Eighth Circuit stated that the district court had ignored the Arkansas "employment at will doctrine," instead looking to the grievance policies and procedures:

We disagree with the District Court that the grievance

> policies and procedures, coupled with the provisions of Act 693 of 1981 providing an appeal before the Merit System Council, conferred a "sufficient expectancy of continued employment" upon Hogue to require a pre-termination due process hearing. Grievance procedures that do not establish any grounds upon which termination must be based do not in themselves create a property interest in employment. *Zeigler* v. *Jackson*, 716 F.2d 847, 849 (11th Cir. 1983). See also *Cato* v. *Collins*, 539 F.2d 656, 660-661 (8th Cir. 1976) (Arkansas Statutes outlining procedures, including the right to a hearing for terminating teachers' employment create no expectancy of continued employment).

App. "B" at p. 44 of Petitioner's Motion.

The Eighth Circuit proceeded to cite the Ninth Circuit as follows:

> Procedural requirements ordinarily do not transform a unilateral expectation into a constitutionally protected property interest. A constitutionally protected interest has been created only if procedural requirements are intended to be a "significant, substantive restriction" on the *** decision making. If the procedures required impose no significant limitation on the discretion of the decision of the decision maker, the expectation of a specific decision is not enhanced enough to establish a constitutionally protected interest in the procedure.

Goodisman v. *Lytle*, 724 F.2d 818, 820 (9th Cir. 1984) (citations omitted).

Petitioner has referred to a statement by Gail Huecker which stated in essence that petitioner's due process rights would be guaranteed during the grievance determination

period. Such a statement does not confer a property interest in employment upon petitioner. Respondents have never denied that Ms. Huecker made such a statement. However, the statement was made in the context of the existing grievance procedures. As a matter of law, the grievance procedures do not amount to a "mutually explicit understanding," as required by *Perry* v. *Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), that would create a significant expectation of continued employment. As the Eighth Circuit stated:

> Here, the grievance policies and procedures merely provide an avenue of appeal for an employee discharged from the Department of Human Services; they do not restrict or even guide that agency's decision making by allowing for termination only under certain circumstances or for specific reasons.

App. "B" at p. 45 Petitioner's Motion. Petitioner did not bargain for a grievance procedure, he had no input whatsoever. Grievance procedures were unilaterally established by respondents.

The Eighth Circuit has properly applied *Bishop* v. *Wood*, *supra*, *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and cases from the Arkansas Supreme Court. *Griffin* v. *Erickson*, *supra*, clearly stands for the proposition that if an employee is not employed for a definite term, he is subject to dismissal at any time without cause. In light of the existing law, petitioner possessed no more than a unilateral expectation of continued employment, which in and of itself is insufficient to entitle him to due process. *Roth*, 408 U.S. at 577.

CONCLUSION

This Court need not grant certiorari because no conflicts exist.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, E. Jeffery Story, do hereby certify that I have served copies of the foregoing by mailing same by U.S. Mail, postage prepaid, to Thorp Thomas, Attorney at Law, 112 West F Street, North Little Rock, AR 72116; and Bob Scott, Attorney at Law, 1611 N. Main, North Little Rock, AR 72116, this 14 day of November, 1986.

E. Jeffery Story